

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of the Commission's Rules To Ensure)	CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency)	
Calling Systems)	
)	
Request for Waiver by Cingular Wireless)	FCC 01-296
)	
Request for Waiver by Nextel Communications)	FCC 01-295
)	
Request for Waiver by Verizon Wireless)	FCC 01-299
)	

SPRINT PCS COMMENTS

Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint PCS"), submits these comments in response to the petitions filed by Cingular Wireless, Nextel Communications, and Verizon Wireless (collectively, "petitioning carriers"), which seek reconsideration of certain provisions of their *Phase II Waiver Orders*.¹ Sprint PCS limits these comments to the single issue of whether the Commission modified in these *Waiver Orders*, including the *Sprint PCS Waiver Order* (FCC 01-297), the legal standard for obtaining additional waivers of the wireless E911 Phase II requirements. As discussed below, Sprint PCS does not believe that the Commission has changed the governing standard for obtaining a waiver of any E911 requirement, and it urges the Commission to clarify this matter.

¹ See *Public Notice*, "Cingular, Nextel, and Verizon File Petitions for Reconsideration of Commission Orders on Wireless E911 Phase II Waiver Requests," Docket No. 94-102, DA 01-2722 (Nov. 20, 2001).

I. THE COMMISSION HAS NOT CHANGED THE GOVERNING LEGAL STANDARD FOR OBTAINING WAIVERS

Commission rules permit waivers “for good cause shown.”² Sprint PCS has previously demonstrated that the Commission has “consistently granted waivers of FCC deadlines when noncompliance is due to circumstances ‘beyond the licensee’s control.’”³ Thus, for example, the Commission recognized in establishing its wireless E911 requirements that carriers may obtain waivers when vendors do not make their E911 modifications timely available or when local exchange carriers (“LECs”) do not timely upgrade the E911 network.⁴ The Commission has similarly entered repeated waivers of the TTY requirement for digital wireless systems because there was no solution available for carriers to implement.⁵

The petitioning carriers read their *Phase II Waiver Orders* as imposing a new “strict liability” standard whereby they will be ineligible to obtain additional waivers and will instead be subject automatically to enforcement actions if they do not meet the requirements imposed in their *Orders* — including in situations where non-compliance is due to circumstances beyond

² 47 C.F.R. § 1.3. Courts have held that the FCC must establish a waiver process with any requirement that it may impose. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969)(Waiver process constitutes “an important member of the family of administrative procedures,” and “a system where regulations are maintained inflexibly without any procedure for a waiver poses legal difficulties.”). *See also AT&T Wireless v. FCC*, No. 00-1304 (D.C. Cir., Nov. 9, 2001), *quoting WAIT Radio*, 418 F.2d at 1157 (FCC “discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”).

³ Sprint PCS Phase II Waiver Reply Comments, Docket No. 94-102, at 2 and n.5 (Sept. 4, 2001)(internal citations omitted). *See also* Sprint PCS Phase II Waiver Request, Docket No. 94-102, at 28 and nn. 19-20 (July 30, 2001).

⁴ *See First E911 Order*, 11 FCC Rcd 18676, 18710 ¶ 66, 18718 ¶ 84 (1996); *First E911 Reconsideration Order*, 12 FCC Rcd 22665, 22709 ¶ 91, 22717 ¶ 107, 22724 ¶ 122 (1997). However, Sprint PCS submits that the current procedure – CMRS carriers must submit waiver requests for LEC tardiness – is not efficient or appropriate. Since the LEC possess the facts explaining its tardiness, it should be the LEC, rather than the CMRS carrier, that submits any needed petition for relief.

⁵ *See, e.g., E911 Reconsideration Order*, 12 FCC Rcd at 22695; *TTY Waiver Order*, 14 FCC Rcd 1700 (1998).

their control.⁶ Sprint PCS cannot agree with this view for two reasons, and again urges the Commission to clarify this important matter.

First, Sprint PCS questions whether the Commission possesses the legal authority to adopt the “strict liability” standard that the petitioning carriers attribute to the Commission. While the Communications Act empowers the Commission to penalize a carrier for “fail[ing] to comply with . . . any rule, regulation, or order issued by the Commission,” with certain exceptions not relevant here,⁷ such a penalty is appropriate only if the carrier’s action is “willful.”⁸ Clearly, a wireless carrier’s failure to meet a certain Phase II E911 deadline because of circumstances beyond its control (*e.g.*, vendor does not timely provide needed modifications, LEC does not timely upgrade the E911 network), would not be a “willful” act or omission – regardless of how the term willful may be defined.⁹

Second, even if the Commission possesses the statutory authority to adopt a “strict liability” standard, it appears reasonably clear that the Commission did not intend to do so in the *Phase II Waiver Orders*. As noted above, the Commission has repeatedly held that waivers of FCC deadlines are appropriate when noncompliance is due to circumstances “beyond the licensee’s control.”¹⁰ A strict liability standard – a licensee is not entitled to a waiver even for cir-

⁶ See Cingular Petition at 22-24; Nextel Petition at 10-16; Verizon Wireless Petition at 2-11.

⁷ See 47 U.S.C. § 503(b)(1)(C) and (D).

⁸ See 47 U.S.C. § 503(b)(1)(B).

⁹ See 47 U.S.C. § 312(f)(1) (“The term ‘willful’ . . . means the conscious and deliberate commission or omission of such act . . .”).

¹⁰ See, *e.g.*, *McElroy Electronics*, 13 FCC Rcd 7291, 7295 ¶ 8 (1998) (“We grant extensions of construction deadlines when the failure to construct is due to circumstances beyond the licensee’s control.”); *Norris Satellite*, 12 FCC Rcd 22299, 22303 ¶ 9 (1997) (“This non-contingent requirement has been strictly construed and only waived when delay in implementation is due to circumstances beyond a licensee’s control.”); *21st Century Telesis*, 15 FCC Rcd 25113 ¶ 18 (2000) (“The Division has granted waivers of the upfront payment deadline in cases where the applicant’s actions demonstrated that, but for reasons outside

cumstances beyond its control – would represent both an entirely new waiver standard and a radical change in Commission precedent. While the Commission ordinarily has the flexibility to change its position on issues, courts have held it “elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent”.¹¹

[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reasons for doing so. Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.¹²

The *Phase II Waiver Orders* did not discuss any reasons for departing from past precedent regarding the governing standard for waivers; nor did the *Orders* even recite the prior precedent. In Sprint PCS’ judgment, this “omission” constitutes powerful evidence that the Commission did not intend to adopt an entirely new waiver standard.

II. CONCLUSION

In summary, there is no basis in law or equity to hold a licensee in violation of FCC rules, much less commence an enforcement action against a licensee, for matters that are outside its control. For the foregoing reasons, Sprint PCS respectfully requests that the Commission con-

the control of the applicant, it would have been able to meet the upfront payment deadline.”); *Telephone Number Portability*, 12 FCC Rcd 7236, 7289 ¶ 92 (1997).

¹¹ *Channel 41 v. FCC*, 79 F.3d 1187, 1191 (D.C. Cir. 1996).

¹² *Wisconsin Valley Improvements v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001)(internal quotations and citations omitted). See also *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001); *AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992).

firm that it did not change the legal standard for obtaining a waiver in any of its *E911 Phase II Waiver Orders*.

Respectfully submitted,

SPRINT SPECTRUM L.P., d/b/a Sprint PCS

A handwritten signature in black ink, appearing to read 'Luisa L. Lancetti', with a long horizontal flourish extending to the right.

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